

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re CHINESE DRYWALL LITIGATION **MDL No. 2047**

Builders Mutual Insurance Company v. Dragas Management Corp., et al E.D. Virginia, C.A.
No. 2:09-cv-185

**PLAINTIFFS' LIAISON COUNSEL'S RENEWED PETITION
FOR NOTICE OF TAG ALONG**

I. INTRODUCTION

On July 15, 2009, Plaintiffs' Liaison Counsel, pursuant to Rule 7.5(e), noticed this Court that this action is a related action and should be transferred and consolidated in the Eastern District of Louisiana in the *In Re: Chinese Manufactured Drywall Products Liability Litigation*, MDL No. 2047. This Panel, without argument, found this matter *sua sponte* was not related to *In Re: Chinese Manufactured Drywall* and thus, did not transfer the action. Plaintiffs' Liaison Counsel now submits this brief to renew our notice of tag along of the above matter and in support of the same, sets forth the now detailed history of the proceeding before the Honorable Eldon E. Fallon in the transferee court.

II. FACTS

Builders Mutual Insurance Company (“Builders”) brought a declaratory judgment action against Dragas Management Corporation (“Dragas”), Hanover Insurance Company (“Hanover”) and Firemen’s Insurance Company of Washington, D.C. (“Firemen’s”). See Complaint attached hereto as Exhibit “A”. This action involves an insurance coverage dispute arising out of Builders’ refusal to cover Dragas pursuant to its policy for third party claims or suits for damages that resulted from the installation of Chinese Drywall in two housing developments.

In February, 2009, Dragas made a claim and demand on Builders for coverage for property damage due to Chinese drywall installed in certain residences. On April 6, 2009, Builders denied coverage for the Chinese drywall claim on the ground that the claim was excluded under the total pollution exclusion contained in all of Builders’ policies. The denial by Builders is based on a common pollution exclusion clause which is found in most insurance policies. Plaintiffs’ Liaison Counsel request this Court consolidate and transfer this action pursuant to 28 U.S.C. § 1407 to the Eastern District of Louisiana with all other Chinese Drywall matters.

III. MDL PROCEEDINGS

This Panel chose the United States District Court of Louisiana as the forum for consolidation and transfer of all the Chinese drywall litigation before the Honorable Eldon E. Fallon. Pursuant to the consolidation, Judge Fallon has established discovery plans, the inspections of properties and various Pre-Trial Orders with regards to the litigation.

Judge Fallon has also established state and federal coordination for all the state cases throughout the country appointing a liaison counsel for each state. Along with discovery

scheduling deadlines for actions involving the manufacture, supply and use of Chinese drywall, the Court has undertaken to provide a forum for addressing the insurance issues at issue in this Petition. See *In Re: Chinese Drywall Products Liability Litigation*, Minute Entry September 24, 2009 of Judge Fallon attached hereto as Exhibit "B" at XIV. The Court states:

There are a number of issues involving insurance matters that will be addressed in this litigation. These include actions against insurers of manufacturers, exporters, importers, brokers, distributors, builders, drywall contractors/installers and homeowners.

Plaintiffs informed the Court that they have created a chart on insurance companies involved in Chinese Drywall litigation and that they would provide it to the Court.

See Minute Entry at XIV (Emphasis supplied)

In fact, Judge Fallon expects to be involved in many insurance matters in this MDL not only because defendants may bring declaratory judgement actions to determine insurance coverage issues but also because Louisiana law provides a direct action statute for the underlying plaintiffs to bring actions against the defendants' insurers to determine coverage issues. LSA-R.S. 22:985. See also *Vincent v. Pen Rod Drilling Company*, 372, So.2d 807 (La. Ct. App. 3d Cir. 1979). Thus, it is beyond peradventure that many direct actions against insurance carriers will address similar issues with regards to whether the carriers are required under their policy to cover the insured for damages in the underlying lawsuits resulting from the use of Chinese drywall.

Further, this Court has already ordered a conditional transfer of a similar matter involving insurance coverage issues in *General Fidelity Insurance Company v. Catherine Foster, et al*, S.D.FL No. 9:09-80754. See Exhibit "B" for Conditional Transfer Order and Order Reinstating

Stay of Conditional Transfer Order (Sept. 25, 2009).¹

Since inception of the E.D. La. MDL, at least three (3) actions have been filed therein naming insurance carriers and placing in issue similar or identical insurance policy provisions. *See Borne v. Liberty Mut. Fire Ins. Co.* (E.D. La.; CA No. 09-6073); *Van Winkle v. Nautilus Ins. Group* (E.D. La.; CA No. 09-4378); *West v. State Farm Fire & Cas. Co.* (E.D. La.; CA No. 09-6356).

It is clear that Judge Fallon is prepared to address the insurance coverage issues in this litigation. This will prevent duplication and inconsistent results and provide for a more efficient adjudications.

Plaintiffs' Liaison Counsel respectfully requests this Court reconsider its denial of the original notice of tag along in the above matter and issue an order consolidating and coordinating this matter to the Eastern District of Louisiana before Judge Fallon pursuant to § 1428 U.S.C. 1407.

¹General Fidelity has served notice of opposition to conditional transfer.

IV. CONCLUSION

Plaintiffs' Liaison Counsel respectfully requests this Court coordinate and consolidate the matter before the Eastern District of Louisiana.

Respectfully submitted,

Dated: October 7, 2009

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Plaintiffs' Liaison Counsel's Renewed Petition for Notice of Tag along to be served this 7th day of October, 2009 by U.S. mail, postage prepaid, upon the following:

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for
MDL 2047 - IN RE: Chinese-Manufactured Drywall Products Liability Litigation**

***** Report Key and Title Page *****

Please Note: This report is in alphabetical order by the last name of the attorney. A party may not be represented by more than one attorney. See Panel rule 5.2(c).

Party Representation Key

- * Signifies that an appearance was made on behalf of the party by the representing attorney.
- # Specified party was dismissed in some, but not all, of the actions in which it was named as a party.
- All counsel and parties no longer active in this litigation have been suppressed.

This Report is Based on the Following Data Filters

Docket: 2047 - Chinese-Manufactured Drywall PL

For Open Cases

Judicial Panel on Multidistrict Litigation - Panel Service List

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Docket: 2047 - IN RE: Chinese-Manufactured Drywall Products Liability Litigation**Status: Transferred on 06/15/2009****Transferee District: LAE Judge: Fallon, Eldon E.**

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